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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. 589

PORT CONSTRUCTION COMPANY,
PETITIONER,

V.

VIRGIN ISLANDS HOUSING AUTHORITY,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

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VIRGIN ISLANDS HOUSING AUTHORITY,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Your Petitioner, Port Construction Company, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the Case of Port Construction Company v. Virgin Islands Housing Authority on April 2, 1970.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Third Circuit

(infra, Appendix A) has not been reported. The opinion of the District Court of the Virgin Islands, after trial to the Court and on Respondent's motion to dismiss (infra, Appendix B) is not reported.

JURISDICTION

The judgment of the United States Court of Appeals affirming the judgment of the District Court of the Virgin Islands, but on the question of the validity of a "no damage" clause, contained in the contract which was the subject of the action, a question not decided by the Virgin Islands Court was entered on April 2, 1970. Petitioner's motion for rehearing was denied by the United States Court of Appeals for the Third Circuit by order dated May 25, 1970. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Does a "no damage" clause in a contract of the Virgin Islands Housing Authority, partially financed by the United States, stating that "No payment * * * shall be made to the Contractor for damages because of hindrance or delay from any cause in the progress of the work, whether such hindrances or delays be avoidable or unavoidable" prohibit recovery by a contractor of damages for delays in the performance of the work occassioned by active interference in such performance by the Housing Authority? Is the provision invalid as contrary to public policy?

STATUTES INVOLVED

No statutes, regulations or constitutional provisions are directly involved. Despite the fact that the United States financed the construction of the public housing involved, the contract itself makes reference only to certain approvals of construction which were to be obtained from the Public Housing Administration, Santurce, Puerto Rico.

STATEMENT OF THE CASE

This petition is being filed in advance of filing that part of the record consisting of the Appendix filed in the United States Court of Appeals for the Third Circuit. References to that Appendix will be made herein, as a request is being made that the record in the Court below, the Appendix be certified by the clerk for filing herein.

This action was brought by Petitioner to recover damages for breach of the express and implied provisions of a contract for the construction of low cost public housing on the Island of St. Thomas, Virgin Islands of the United States (App. 1 - 12). The contract called for completion of the work within 750 days of notice to proceed, at a contract price of $3,375,841.00. It took Petitioner 1280 days to complete the work, at a cost of $4,941,101.00 (App. 1 - 12).

At the close of Petitioner's case in the District Court of the Virgin Islands, Respondent moved to dismiss, principally on the ground that the "no damage" clause [supra, Section 13(b)] of the contract prohibited recovery. Respondent renewed its

motion at the close of the case. The District Judge after considering the matter granted the motion but not on the basis of the "no damage" clause. Appendix B, infra. As the Court's decision was on the merits and as it appeared that the District Court had failed to find the facts specially and state separately its conclusions of law as required by Rules 41(b) and 52(a) F.R.C.P., Petitioner took an appeal to the United States Court of Appeals for the Third Circuit.

That Court, after considering the briefs and oral argument decided that the "no damage" clause was a bar to Petitioner's recovery. It gave no consideration to the record or to whether or not Respondent's interference was active. Petitioner's motion for rehearing was denied without opinion on May 25, 1970.

ARGUMENT

The Court of Appeals has decided an important state or territorial question in a way which is in conflict with applicable decisions of state courts. In so doing it based its decision on one of its own decisions, which in turn was based on decisions of state courts in conflict with the modern trend. All of these cases involved the same "no damage" clause as involved here, and all involved housing authorities financed or partially financed by the United States. The clause, it would thus appear is a creature of the Public Housing Authority of the United States.

That a conflict exists, which should be resolved by this court is demonstrated by a review of the cases. In Anthony P.

Miller Inc., v. Wilmington Housing Authority, 165 F. Supp. 275 (1958), which relied on Psaty & Fuhrman v. Housing Authority of City of Providence, 76 R.I. 87, 68 A.2d 32 (1949), the exculpatory provisions of an identical "no damage" clause were sustained. These cases relied on Wells Bros. Co of N.Y. v. United States, 254 U.S. 83, 41 S.Ct. 34, (1920), where the clause involved was significantly different than that involved here and in the Miller and Psaty & Fuhrman cases. In the Wells case the contract permitted the government to suspend the work under stated conditions and added that no claim was to be made or allowed to the Contractor for any damages which might arise out of any delay thereby caused by the United States. Where there was such a specific reservation of the rights to cause delay without damages, the courts held, the limitation was enforcible. Neither here nor in Miller and Psaty & Fuhrman is there specific reservation to the Authority.

Anthony Miller, failed to take into account not only the language of the Wells case, but the holding of the Minnesota Supreme Court in Hill v. City of Duluth, 57 Minn. 231, 58 N.W. 992 (1894), wherein the court said, concerning a similar clause:

> "The phrase 'from any cause whatever' must be held to refer to any other cause than the Act of the City . . ."

It also ignored McGuire and Hester v. City and County of San Francisco, 113 Cal App. 186, 247 P.2d 934 (1952), which cited the Hill case with approval, adding (at page 938 of 247 P.2d):

> "We can see no reason for denying recovery of damages . . . suffered by Plaintiff because

> of Defendant's neglect. Nor is it important whether such neglect was not caused by bad faith on the part of the Defendant".

Later cases in the State Courts in construing provisions similar to Section 13(b) here relied on have followed these cases.

In Algernon Blair, Inc. v. Norfolk Redevelopment and Housing Authority, 200 Va. 815, 108 SE 2d (1959), the Contractor contended that in agreeing to Paragraph 13(b) of the contract, the same provision as in this case, the parties did not contemplate direct interference by the Defendant with Plaintiff's performance of the contract. The Defendant had issued stop orders because it could not decide whether its own specifications were inherently faulty when written, and these stop orders caused a delay of 35 days. The Virginia Court of Appeals cited with approval the language of 10 A.L.R.2d, Note, Page 801 at Page 805:

> ". . . and the courts appear in accord that a provision in a construction contract relieving a Contractee from liability for delays is not applicable to delays caused by conduct constituting active interference by the Contractee."

In Housing Authority of City of Dallas v. Hubbell, 325 SW 2d 880 (1959), the Housing Authority appealed a judgment awarding the Contractors damages for delays caused by the Owner-Housing Authority. The Authority based its charge of error on Wells Bros. Co. of N.Y. v. United States, supra, Psaty & Fuhrman v. Housing Authority of City of Providence,

supra, and A. Kaplen & Sons, Ltd., v. Housing Authority of Passaic, 42 N.J. Super. 230, 126 A.2d 13 (1956). The Court rejected the Authority's contentions and held (at page 891):

> "The 'no-damage-for-delays' provision was intended to protect owner from damages for delays caused by other than owner, and was intended to protect owner from damages for delays caused by Owner itself even if such delays were due to Owner's negligence and mistakes in judgment. But the 'no-damage-for-delays' clause provision did not give Owner a license to cause delays 'willfully' by unreasoning action' [sic], 'without due consideration' and in 'disregard of the rights of other parties', nor did the provision grant Owner immunity from damages if delays were caused by Owner under such circumstances." (Italics supplied).

Finally the Court of Claims, raised for the first time, the question of public policy, an important question, in Ozark Dam Constructors v. United States, 127 F. Supp. 187, 130 Ct.Cl. 354. In that case the Plaintiff sued for damages for delay in delivering cement, which the Government had agreed to supply. The clause involved was similar to that in Wells. It provided:

> "The Government will not be liable for any expense or delay caused to Contractor by delayed deliveries

except as provided under Article 9 of the contract."

Article 9 of the contract was the standard "Delays-Damages" clause, similar in form to Clause 13(a) of the contract here in question. The Government's motion to dismiss was made in the face of allegations that the Government knew of the delay in delivery due to a railroad strike, that it knew delay in delivery would certainly close down the project and that the Government could have arranged other means for delivery. In denying the motion the Court of Claims said:

> "We do say that the Government's position that the provision must be taken literally, so that the Government is not liable for the consequences of any conduct whatsoever of its representatives, is wrong. . ."

The reliance of the Court of Appeals on its decision in F. O. Rich Co. v. Wilmington Housing Authority, 392 F.2d 841 (C.A. 3, 1968) we suggest requires this Court's review. That decision is based on Anthony P. Miller and Psaty & Fuhrman, supra, cases which it is suggested are no longer to be considered valid.

CONCLUSION

The importance of a decision by this Court as to the validity of the "no damage" clause here in question, to Contractors who

bid on public housing projects is clear. If they are to be denied recovery of any damages regardless of the conduct of the Authority they should know that before they bid. The present conflict in the decisions should be resolved, and the question of public policy decided upon.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 17615 and 17616

PORT CONSTRUCTION COMPANY,
Appellant in No. 17615,

v.

VIRGIN ISLANDS HOUSING AUTHORITY,
Cross Appellant in No. 17616

ON APPEAL FROM THE DISTRICT COURT
OF THE VIRGIN ISLANDS,
DIVISION OF ST. THOMAS AND ST. JOHN

Argued January 30, 1970

Before HASTIE, *Chief Judge*, and STALEY and STAHL,*
Circuit Judges.

OPINION OF THE COURT

(Filed April 2, 1970)

PER CURIAM.

Appellant Port Construction Company, a Florida corporation, sued the Virgin Islands Housing Authority for breach of contract in the District Court of the Virgin Islands. The case was tried to the court. At the conclu-

* Judge Stahl heard the argument and participated in the consideration of the appeal in this case but not in the decision which occurred after his death.

sion of all the evidence, the court dismissed the case with costs to defendant. Port Construction Company in No. 17615 appeals from the judgment of the district court dismissing the case, and the Virgin Islands Housing Authority has filed a cross-appeal in No. 17616 from that portion of the order which denies its claim for counsel fees and from the district court's denial of its motion for security for costs.

The contract in issue had been awarded to Port by the Authority after bids were taken for the construction of a 45 unit housing project in Charlotte Amalie on the Island of St. Thomas. The cost of the job went well over Port's bid, principally because 530 additional days were required to complete the work. Some adjustments to the bid were allowed by the Authority at the completion of the work; even with these allowances, however, Port took an overall loss on the job. It seeks to recover that loss by this action, alleging that the Authority's breaching of the contract caused the work to be delayed.

The Authority argues that the terms of the written contract preclude any claim for damages because of delay. It was specified in Paragraph 13(b) of the contract that "No payment * * * shall be made to the contractor for damages because of hindrance or delay from any cause in the progress of the work, whether such hindrances or delays be avoidable or unavoidable." We agree that Port was bound by this provision of the contract. F. D. Rich v. Wilmington Housing Authority, 392 F.2d 811 (C.A. 3, 1968). The judgment of the district court in No. 17615 will be affirmed.

With respect to the cross-appeal of the Virgin Islands Housing Authority in No. 17616, there are two preliminary motions before this court. The Authority's cross-motion that the court require Port Construction Company to provide security for the costs of this appeal will be denied. The motion by Port Construction Company to dismiss the cross-appeal will be denied in light of this court's decision.

The cross appeal by the Authority is from the denial of its motion for security for costs and the refusal of its claim for counsel fees. The district court denied the motion for security for costs because it was not timely, having been first made after the trial had begun. The Authority argues that it did not learn of Port's insolvency until that time, and that under special circumstances such as these, the court should have allowed its motion. Port Construction Company instituted the suit in April of 1961; the motion for security for costs was not made until April 1968, after the case had been in trial two weeks. Port had been dissolved by a gubernatorial proclamation on January 1, 1965. The award of counsel fees and the posting of security for costs are matters clearly within the discretion of the district court. A study of the record convinces us that the district court did not abuse its discretion. The orders of the district court in No. 17616 will therefore be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NO. 17,615

PORT CONSTRUCTION COMPANY,
Appellant,

v.

VIRGIN ISLANDS HOUSING AUTHORITY.

SUR PETITION FOR REHEARING

Present: HASTIE, Chief Judge, and STALEY, FREEDMAN, SEITZ, VAN DUSEN, ALDISERT, ADAMS and GIBBONS, Circuit Judges.

The petition for rehearing filed by PORT CONSTRUCTION COMPANY, appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

(Sgd.) William H. Hastie
Chief Judge

Dated: May 25, 1970

APPENDIX B

[Caption Omitted in Printing]

JUDGMENT

The court having this date entered its Memorandum Opinion in the within action does hereby

ORDER, ADJUDGE AND DECREE that plaintiff take nothing by his suit and that it be and is hereby dismissed with costs to defendant.

September 30, 1968

WALTER A. GORDON
Judge of the District Court

[Caption Omitted in Printing]

MEMORANDUM OPINION

This is an action for breach of contract arising out of the building of a large public housing complex in the Sugar Estate area of St. Thomas. Plaintiff alleges unreasonable delay and interference by defendant which increased the cost to plaintiff of its performance. Specifically, it is alleged that defendant (1) failed or refused to return approved shop drawings, samples, descriptions, and samples; (2) issued change orders; (3) issued stop-work orders in an attempt to coerce plaintiff into permitting defendant to direct the work and employment policies of plaintiff; (4) induced plaintiff's employees to strike; (5) failed to advise plaintiff that the Government of the Virgin Islands intended to award major construction

projects in St. Thomas, thus forcing plaintiff to compete for labor and aggregates which would have otherwise been available.

At the close of plaintiff's case, defendant moved to dismiss for the failure of plaintiff to make out a prima facie case. The motion was argued at length, and renewed at the close of the case. Both motions were taken under advisement, and the parties have since provided the Court with the transcript of the trial and extensive memoranda in support of their respective positions. Persuasive legal arguments are advanced by defendant in support of the substantive insufficienty of plaintiff's case. Leaving aside several of the arguments of defendant, which if sustained, would preclude the Court's even reaching a discussion of the facts, and assuming ad arguendo, that the sole issue to decide is whether or not defendant's actions constituted a breach, it is clear to the Court as to the first three theories of breach advanced by plaintiff that it has filed to sustain them by a preponderance of the evidence. While it is clear that the hindrance by one party of the performance by another may constitute an actionable breach, the Court, as the total facts of this case have been developed, is unable to conclude that reasonable minds could differ in construing the acts of the defendant as a breach of an implied promise not to interfere in plaintiff's performance. The failure or refusal to approve and return shop drawings, characterized as such an interference, is nowhere borne out by the evidence. It is clear to the Court that defendant, in the few instances that were brought out in the trial, had reasonable cause to reject or

return shop drawings, samples and descriptions submitted for approval. The testimony is that defendant found these unsatisfactory under the terms of the contract. While this may or may not have been true, it is a long bridge from that situation to an actual interference, and one which plaintiff has not begun to cross.

In the same light does the Court view the issuance of change orders. Apparently, plaintiff is not satisfied with the terms of the final contract settlement with respect to change orders and now seeks to assign as breach, the issuance of these orders, under the same theory: that by issuing change orders defendant interfered with plaintiff's performance; or to use plaintiff's characterization: "that the defendant unreasonably, negligently, arbitrarily, capriciously, and deliberately interfered . . .". While the Court is not sure that such an array of adjectives is necessary to make out a cause of action under plaintiff's theory of the case, it seems wholly unreasonable to the Court to characterize the issuance of change orders in this case as actionable interference. Defendant had the contractural right to order changes, and the record as the Court views it is devoid of a showing that the method or manner in which change orders were issued was beyond the authority of the defendant to the extent that they may be denominated as an illegal hindrance.

Passing finally to stop-work orders and to what has been characterized as "unreasonable-overinspection", the Court is asked to assign to these the lable of hinderance. This the Court cannot do. In every instance in this record, there

is at least a reasonable basis for defendant's objection to the performance on the part of the plaintiff, and the Court believes that the objections raised by the defendant, and defendant's instructions to plaintiff to desist until the deficiencies were remedied were wholly consistent with the unsatisfactory workmanship of which defendant complained.

To assign as breach the stoppage of arguably unsatisfactory work, and to denominate these stoppages as an active interference in the performance of a construction contract is not warranted by the facts before the Court in this case.

On the facts alone, as they stand in this record, the Court is at a loss to concur with the characterization of them by plaintiff. It is true that the record is replete with disagreements between the parties, but after three weeks of trial, pounds of exhibits, and 1,761 pages of testimony, the Court finds it wholly unwarranted to characterize the acts of defendant as an unreasonable prevention or hindrance in the performance of this contract by plaintiff.

The Court will hold as a matter of law that the acts of defendant's servant in participating or organizing a strike against plaintiff are not attributable to defendant, absent a showing that the servant was acting within the scope of his duties, a point on which there is not one iota of proof in the record. Likewise, the Court will hold as a matter of law that the Virgin Islands Housing Authority was under

no obligation whatsoever to inform defendant of proposed Government of the Virgin Islands construction projects on the Island of St. Thomas.

This leaves the matter of defendant's motion for security for costs, and the question of costs and attorneys' fees. The Court has considered defendant's reargument of the motion, but is still of the opinion that the motion should have been made within a reasonable time after the commencement of the lawsuit, and will not now require plaintiff to post security. Finally, there is the matter of an award of costs, but the Court is hesitant to award a sum by way of attorneys' fees. The Government of the Virgin Islands, and the Virgin Islands Housing Authority is capably represented by the Office of the Attorney General of the Virgin Islands. That the Housing Authority finds i necessary to employ special counsel for the trial of a lawsuit should not work to the financial detriment of litigants who unsuccessfully seek redress from the Court for acts of the Government or its independent agencies. To award in favor of the Housing Authority a sum by way of reimbursement for counsel fees would be, in effect, to raise a substantial deterrent to the litigation of complaints against the government or its agencies by businesses and citizens. The Court, therefore, will not make an award of counsel fees in this case. September 30, 1968.

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